

BEFORE THE
FEDERAL RAILROAD ADMINISTRATION

DOCKET NO. FRA 2001-11068:
CONTROL OF ALCOHOL AND DRUG USE: PROPOSED APPLICATION OF
RANDOM TESTING AND OTHER REQUIREMENTS TO EMPLOYEES OF A
FOREIGN RAILROAD WHO ARE BASED OUTSIDE THE UNITED STATES AND
PERFORM TRAIN OR DISPATCHING SERVICE IN THE UNITED STATES

COMMENTS OF
THE ASSOCIATION OF AMERICAN RAILROADS

On behalf of its member railroads, the Association of American Railroads (AAR)¹ submits the following comments in response to FRA's notice of proposed rulemaking (NPRM) concerning the application of its drug and alcohol regulations to foreign railroads' foreign-based (FRFB) employees.² The NPRM proposes to apply FRA's regulations governing identification of troubled employees, pre-employment testing, and random testing to train and dispatching employees.

Two of AAR's member railroads, Canadian National (CN) and Canadian Pacific Railway (CP), submitted extensive comments in this proceeding. AAR endorses those comments and would like to emphasize a point made by both railroads, that application of FRA's random testing requirements to FRFB train employees could significantly disrupt cross-border operations.³

CN and CP both noted that FRA's random drug testing requirements are inconsistent with Canada's Human Rights Act.⁴ Consequently, CN and CP noted, FRFB employees may be within their rights under Canadian law to refuse to enter the U.S. and subject themselves to random drug testing.

¹A trade association whose membership includes freight railroads that operate 76 percent of the line-haul mileage, employ 91 percent of the workers, and account for 93 percent of the freight revenue of all railroads in the United States; and passenger railroads that operate intercity passenger trains and provide commuter rail service.

²66 Fed. Reg. 64000 (Dec. 11, 2002).

³Dispatching is not of concern because FRA has proposed to exclude from this proposal FRFB dispatchers exempt from the requirement that dispatching of U.S. operations take place in the U.S. Were FRA to change this exemption, dispatching, too, could become a significant problem.

⁴See CN's comments, p. 3, filed Feb. 7, 2002, and CP's comments, p. 19, filed Feb. 12, 2002.

Were that to occur and FRA adopt the requirements set forth in its NPRM, the railroads may well be forced to discontinue operations where Canadian crews bring trains from Canada to interchange locations in the U.S. located just across the border from Canada.

If Canadian crews could not come into the U.S., railroads would be forced to use U.S. crews to bring trains into Canada for interchange -- if possible. In places such as Buffalo, Detroit, St. Albans, and Rouses Point, where interchange of border traffic takes place in the U.S., comparable interchange facilities are not located in Canada. Even if interchange facilities could physically be built in Canada, and that may not be feasible in many cases due to land constraints, the required investment would be enormous.

Furthermore, moving interchange to Canada might have the counterproductive effect of undermining random drug testing of U.S. employees. If U.S. train crews were to end their shifts in Canada where they can refuse to undergo random testing, railroads would be forced to conduct random testing on these employees at the beginning of their shifts in the U.S. That would remove an element of unpredictability in scheduling random testing.

To date, FRA has not taken into account the problems its proposal would cause for interchange operations at the U.S./Canadian border.⁵ Were FRA to modify its regulatory evaluation to reflect the burdens its proposal would impose at border operations, it would not be able to justify imposing random testing requirements on FRFB employees conducting border operations. Consequently, AAR urges FRA to withdraw this aspect of its proposal.

Respectfully submitted,

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⁵See FRA's Regulatory Evaluation dated Sept. 25, 2000 (placed in the docket).